

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: **January 24, 2001**

Case No.: **2000-INA-182**

CO No.: **P1999-NJ-02415062**

In the Matter of:

VALENTINE J. IGLAR

Employer,

on behalf of:

ELZBIETA SAMSEL

Alien.

Appearance: Andrew J. Olshevski, Esquire
for Employer and Alien

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from an application for labor certification¹ filed by Valentine J. Iglar ("Employer") on behalf of Elzbieta Samsel ("the Alien") for the position of Domestic Cook. The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. § 656.27(c).

¹ Alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. Unless otherwise stated, all references are to 20 C.F.R.

STATEMENT OF POSITION

On September 30, 1996, Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Domestic Cook. (AF 29-35). The job to be performed was described as follows:

Plan menus, purchase food, prepare, cook, bake meals, including Italian & Polish cuisine, for working couple, business/social guests as suitable for occasion & according to recipes and considering taste and dietary requirements. Clean kitchen. Wash & iron table linens. Set & decorate table; decorate platter & baskets.

(AF 35). Total hours of employment were listed as 40 hours per week, from 7:00 a.m. to 3:00 p.m. Minimum requirements for the position were listed as a high school education and two years experience in the job offered. Other special requirements included no smoking on premises and knowledge of Italian & Polish recipes. *Id.* Employer received no applicant referrals in response to its recruitment efforts. (AF 25-26).

A Notice of Findings (“NOF”) was issued by the CO on June 29, 1999, citing § 656.20(c)(8) and questioning the existence of a *bona fide* job opportunity open to any U.S. worker. (AF 39-42). The CO noted that under immigration law, the number of immigrant visas available to “unskilled workers” is very limited, whereas, there is no current waiting period for most immigrant visas in the “skilled workers” category. Because the occupation of Domestic Cook requires two years of experience, it is considered a skilled position. Employer was instructed to explain why the position should be considered a *bona fide* opportunity for a Domestic Cook as opposed to one created solely for the purpose of qualifying the Alien as a skilled worker under current immigration law. Rebuttal evidence, at a minimum, was to include responses to twelve enumerated questions including documentation where appropriate. (AF 41).

In Rebuttal, Employer first cited to a Board case used to determine whether a job opening exists, and not merely the functional equivalent of self-employment, in order to show that a job opportunity actually exists in this case. (AF 43-54). Employer then addressed the questions presented in the NOF, stating that the Cook would prepare breakfast, lunch and dinner daily, with 60 minutes to prepare breakfast, 45 minutes to prepare lunch and 150 minutes to prepare dinner, for a total of 21 hours and 15 minutes each week. Employer stated that shopping would require an additional 7½ to 10 hours, and dishwashing an additional 4 hours. Employer stated that meals were to be provided for himself, his spouse, their two adult, live-in children, their numerous guests, and the cook herself on a daily basis. Employer stated that both he and his wife work from 9:00 a.m. to 6:15 p.m. and that their two adult children attend school between the hours of 11 a.m. to 12 p.m. and 7 p.m. to 8 p.m.

Employer indicated that there are no other domestic workers employed in the home and that the general household maintenance duties, such as cleaning, clothes washing, vacuuming, etc. are regularly performed by Ms. Iglar herself with occasional assistance from her sister and sister-in-law. Employer stated that the household has not employed any full-time Domestic Cooks or other workers in the past but that their professional duties and inability to utilize the continuing assistance by family led to the job offer. Employer stated that the household entertains frequently including both social and family occasions, as well as business-related meetings and cocktail parties. *Id.* Employer previously provided a list of entertainment events for the period from October 14, 1998 to January 15, 1999, but provided no further documentation. (AF 13-14).

A Final Determination (“FD”) denying labor certification was issued by the CO on September 29, 1999, based upon a finding that Employer had failed to adequately document that there is a *bona fide* position for a Domestic Cook. (AF 55-56). In the FD, the CO noted (incorrectly) that Employer had failed to indicate the schedule of his wife, but assumed (correctly) that she was gone from the house the same time as Employer. The CO noted that Employer’s two adult children, “whose schooling only requires 2 hours each day (according to employer’s rebuttal)” were available to prepare meals themselves.² Hence, the CO questioned the need for a full-time cook at all. The CO further noted that Employer does not indicate that he and his wife would bring home-cooked meals to work for lunch, nor that they take their lunch at home; thus it must be assumed that the Domestic Cook is only responsible for preparing breakfast and dinner, which “does not constitute a full-time, bona fide job offer for a Domestic Cook.” In addition, the CO cited Employer’s failure to submit an entertainment schedule, which precluded her from determining the Cook’s demands for food preparation for guests and entertaining. The CO thus concluded that Employer has failed to prove that a *bona fide* Domestic Cook position exists within his household and labor certification was denied. (AF 56). Employer filed a Request for Review on October 29, 1999. (AF 57-68).

DISCUSSION

In *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*), the Board held that the lack of sufficient duties to keep a worker gainfully employed for a substantial part of a work week may be relevant to the issue of whether the employer is offering a *bona fide* position, but that such situations are to be looked at under the totality of the circumstances, not just a lack of duties to keep the worker occupied in cooking related work throughout the day. This test was set out in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

²The CO, in reaching this conclusion, has relied on Employer’s rebuttal which states that the two adult children attend schools between the hours of 11 a.m.-12 p.m. and 7 p.m.-8 p.m. Read in conjunction with Employer’s January 21, 1999 letter, it becomes clear that both students are gone from the home from 11 or 12 until 7 or 8. (AF 13, 50).

In the instant case, the CO summarily denied labor certification on the basis that the Employer did not appear to require the services of a full-time Domestic Cook. Moreover, the CO misstated facts about the Employer's rebuttal, and failed to apply the totality of circumstances test. Accordingly, this matter will be remanded for issuance of a supplemental NOF for reevaluation of the application consistent with a correct reading of Employer's submissions and the Board's decisions in *Carlos Uy III* and *Daisy Schimoler, supra*.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and **REMANDED** for consideration consistent with this opinion.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

